(5)

No. 92-606

Supreme Court, U.S.
FILED
DEC 17 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

*Petitioner,*

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY BRIEF OF PETITIONER

THOMAS J. KNAPP
*Counsel of Record*
LAWRENCE M. STROIK
CHARLES W. SHEWMAKE
ODESA L. GORMAN-STAPLETON

BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102
(817) 878-2380
*Attorneys for Petitioner*

December 18, 1992

BEST AVAILABLE COPY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

CONGRESS DECIDED IN 1926 THAT ALL REMEDIES ARE AVAILABLE AND THERE IS NO SHOWING BY BMWE THAT CONGRESS HAS SINCE THAT TIME EXPRESSLY STATED OTHERWISE ..... 2

THE UNION'S ALLEGED RIGHT TO "GUESS WRONG" LACKS ANY BASIS IN THE RLA OR THIS COURT'S DECISIONS ..... 4

RECENT CASES RELIED ON BY BMWE ACTUALLY SUPPORT THE PROPOSITION THAT FEDERAL COURTS HAVE BROAD REMEDIAL POWERS UNDER THE RLA ..... 7

THE COMMON LAW OF THE RLA DOES NOT SUPPORT *BURLINGTON NORTHERN'S* ABSOLUTE RULE ..... 8

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

## CASES

*Association of Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992).....7, 8

*Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30 (1957).....4, 5

*Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86 (5th Cir. 1992)..... *passim*

*CSX Transportation, Inc. v. Marquar*, No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992)..... *passim*

*Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570 (1971).....3, 7

*Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299 (1989)..... 5

*Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969)..... 5

*Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992).....2, 3

*Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958)..... 7

*United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).....8, 9

*United Transportation Union v. Florida East Coast Railway*, 586 F.2d 520 (5th Cir. 1978)..... 9

# TABLE OF AUTHORITIES

Page

STATUTES

45 U.S.C. § 152 First ..... 7

45 U.S.C. § 153 First ..... 5

45 U.S.C. § 156 ..... 9

No. 92-606

In The

# Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

*Petitioner,*

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY BRIEF OF PETITIONER

Petitioner, Burlington Northern Railroad Company ("BN"), replies to the brief in opposition to BN's Petition for Writ of Certiorari filed by respondent, Brotherhood of Maintenance of Way Employes ("BMWE"). That brief advanced the proposition that a monetary recovery is never available when a union violates the RLA by striking over a minor dispute. However, Congress intended the courts to have broad remedial powers, including monetary relief, to remedy violations of the RLA. The Fifth Circuit's flat rule of law that a monetary remedy is **never** available for a violation of a union's duty not to

strike over minor disputes directly conflicts with the RLA and this Court's decisions. BN's Petition presents a crisp issue of law that the lower courts have had difficulty resolving.[1] To settle this continuing controversy, BN respectfully requests this Court to grant its Petition for Writ of Certiorari and review the judgment and opinion of the *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86 (5th Cir. 1992) ("*Burlington Northern*").

## CONGRESS DECIDED IN 1926 THAT ALL REMEDIES ARE AVAILABLE AND THERE IS NO SHOWING BY BMWE THAT CONGRESS HAS SINCE THAT TIME EXPRESSLY STATED OTHERWISE

BMWE argues that it should be for Congress rather than the courts to determine if a carrier may be awarded remedial damages for a union's violation of its duty not to strike over minor disputes. Opposition Brief at 20-23. Essentially, the union argues because no court has ever found damages to be an appropriate remedy for a union's illegal strike over a minor dispute, that such a remedy will *never* be appropriate unless an act of Congress specifically allows for such a remedy.[2]

---

[1] The Sixth Circuit is one of those courts. Its most recent decision on this issue is *CSX Transportation, Inc. v. Marquar*, No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992) ("*Marquar*"). The time for filing a petition for rehearing was December 11, 1992, and CSX Transportation has not filed such petition nor requested an extension of time in which to file such petition after such date.

[2] Although BMWE relies heavily on the *Marquar* decision, the Sixth Circuit court unanimously found that the presumption of all available remedies announced in *Franklin* applies to the RLA, and that Congress has never indicated that any particular remedy was not appropriate to compensate a carrier for an unlawful strike over a minor dispute. (Slip op. at 10; 13a).

These arguments illustrate BMWE's very deep misunderstanding of this Court's *Franklin* decision and the drafters' intent of the RLA. *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992). First, BMWE argues that *Franklin* is applicable only to Title IX of the Education Amendments of 1972. The unanimous *Marquar* court found that "*Franklin* . . . set out general principles governing the availability of particular remedies under any federal statute." (Slip op. at 10; 8a and n.4); *See Franklin*, 112 S. Ct. at 1035.

Second, by leaving out the word "expressly" in *Franklin's* statement that the court presumes a damages remedy "unless Congress has expressly indicated otherwise," (112 S. Ct. at 1036), BMWE argues that Congress has, by its silence, "indicated otherwise." (Opposition Brief at 18). This argument was dismantled by the unanimous portion of the *Marquar* decision, wherein the Sixth Circuit found that Congress never indicated that any particular remedy was not available for violations of the RLA. (Slip op. at 16-26; 12a-21a). Not willing to concede defeat, BMWE goes on to reargue the same points thoroughly refuted in *Marquar. Compare* Opposition Brief at 18-19 with *Marquar*, Slip op. at 16-26; 12a-21a.

Thus, BMWE's argument completely contradicts this Court's decisions in *Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570 (1971) and *Franklin*, and is at odds with the RLA drafters' intent. Congress left it to the courts to determine the appropriate remedies for violations of the RLA. The Fifth Circuit's failure to acknowledge that fundamental premise in the RLA, that Congress gave the courts **broad remedial powers** makes this Court's review necessary.

---

References to "___a" are to the Appendix in BN's Supplemental Brief filed December 7, 1992.

## THE UNION'S ALLEGED RIGHT TO "GUESS WRONG" LACKS ANY BASIS IN THE RLA OR THIS COURT'S DECISIONS.

One of the most striking new arguments in the opposition brief is BMWE's reassertion of a long discredited position: the union, at its whim, may choose whether or not to use the arbitration procedures Congress made compulsory under the RLA. (Opposition Brief at 29-30). This position is proffered by BMWE as its "reasonable belief" theory which is similar to the *Marquar* court's view that the unions have a right to "guess wrong." *Marquar,* Slip op. at 78; 57a. However, the burden is on the unions to engage in arbitration or go to court for a determination of their "reasonable belief."

The BMWE argues that if *Burlington Northern* is reversed, there will be a "chilling effect" on the union's "right to strike" whenever it has a "reasonable belief" that a dispute may not be a minor dispute. *Burlington Northern* is not about the "right to strike" or a union's "reasonable belief" or "guessing wrong." The strike by BMWE was unlawful. 961 F.2d at 88 and n.6. The dispute was determined to be a minor dispute. 961 F.2d at 87. What is at issue here is *Burlington Northern's* holding that monetary relief is **never** available to remedy an illegal strike over a minor dispute.

This right to "guess wrong" or "reasonable belief" theory is a variant of the position taken by unions more than thirty-five years ago in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad,* 353 U.S. 30, 37 (1957). There, the unions argued that they were free to decide whether or not to use the peaceful, but compulsory, arbitral mechanisms of the RLA. In keeping reciprocal the duties of peacefully resolving minor disputes, this Court stated that both unions and carriers are required to proceed to arbitration to resolve their minor disputes, and that the unions had conceded their right to strike over such disputes. 353 U.S. at 37-39.

As this Court has recently reaffirmed, the unions have no right to strike over minor disputes. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 304 (1989) ("*Conrail*"). Any legal basis for BMWE to assert that it can either "guess wrong" or have a "reasonable belief" that allows it to strike in a minor dispute, disappeared more than thirty-five years ago in *Chicago River*. *See Marquar*, Slip op. at 43; 34a.

The only support advanced by BMWE for its new argument is this Court's decision in *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 154-55 (1969) ("*Shore Line*") (Opposition Brief at 2 n.2). However, neither the *Shore Line* decision nor any other decision of this Court stands for the proposition that a union may initially avoid the dispute resolution mechanism set forth in Section 3 First of the RLA, 45 U.S.C. § 153 First, and conduct a disruptive strike instead of pursuing relief in a judicial or arbitral forum.[3]

In addition to its flawed policy arguments, BMWE attempts to use its counter-statement of the facts to support its variation of this previously rejected position. These counter-statement facts actually refute most of BMWE's argument.[4] BMWE argues that because it was

---

[3] Indeed, in *Conrail*, this Court cited *Shore Line* for the proposition that an injunction, rather than a strike, is the proper remedy available to a union for a carrier's violation of the *status quo*. *Conrail*, 491 U.S. at 304.

[4] BMWE makes much ado about the facts set forth in BN's Petition. Those facts, which are two pages and two footnotes in length, appear either in the Fifth Circuit's decision or in the record in the court below. Though BMWE asserts that there were misstatements or factual assertions beyond the record made by BN, it never pointed out any such misstatements or factual assertions. Apparently, BMWE created this pretext to advance facts to support its main opposition argument that here BMWE had a "reasonable belief" that there was a major dispute and, as such, it had the "right to strike" instead of pursuing relief in

without a "court at its elbow," it had little or no time in which to evaluate whether the dispute was major or minor. (Opposition Brief at 29). BMWE's own facts belie this argument. There was obviously ample time and opportunity for BMWE to go to court to obtain a declaration of the nature of the dispute since the dispute ran from March 1990 until June 26, 1990, when BMWE struck BN. Indeed, BMWE states that it took more than a month to obtain strike authorization. (*See* Opposition Brief at 8-9). However, BMWE provides no explanation whatsoever for its failure to pursue the two peaceful options – arbitration or court. Instead, BMWE asserts only that it "believed the only recourse available to it . . . was to engage in self-help." (Opposition Brief at 8). The effect of BMWE's refusal to pursue judicial relief was to shift the burden of going to court, on short notice, in the middle of the night, to BN. Thus, carriers and the public suffer severe damage when it would have been appropriate for the union to seek declaratory relief prior to initiating its strike.

As BN pointed out in its petition, in the absence of review by this Court, the absolute rule announced by the Fifth Circuit, which prohibits a carrier from ever obtaining monetary relief for illegal strikes, will continue to have an adverse effect on the peaceful and prompt resolution of minor disputes under the RLA. (BN Petition at 26). The rule announced in *Burlington Northern* as interpreted by BMWE and construed by the majority in *Marquar* does not encourage unions to resolve their disputes through the congressionally mandated arbitration procedures or seek judicial declarations, but instead encourages economic disruption and transportation chaos. The

---

judicial or arbitral forums. As stated here at p. 4, the Fifth Circuit never determined whether BMWE had a "reasonable belief" but bluntly held that monetary relief is never available for an illegal strike over a minor dispute.

immediate need to review this decision is supported by BMWE's interpretation of *Burlington Northern* that unions can obtain one "free interruption" of commerce in a minor dispute, and not pursue the peaceful, yet compulsory, arbitral mechanisms of the RLA. Without review by this Court, there is no incentive for the unions to first resolve their disputes through arbitration or seek judicial relief, and there will be little deterrence for unions to refrain from striking over minor disputes.

## RECENT CASES RELIED ON BY BMWE ACTUALLY SUPPORT THE PROPOSITION THAT FEDERAL COURTS HAVE BROAD REMEDIAL POWERS UNDER THE RLA

BMWE states that other courts are denying damage remedies under reasoning similar to *Brown*,[5] *Burlington Northern*, and *Marquar*, Opposition Brief at 11 n.13, 14, citing specifically, *Association of Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992). In that case, the union sued Horizon Air under Section 152 First of the RLA, 45 U.S.C. § 152 First, for violating the duty to exert reasonable efforts to make an agreement. 976 F.2d at 543. Though the Ninth Circuit affirmed the trial court's finding that Horizon Air violated § 152 First, the court reversed the trial court's award of attorney's fees. The court held that attorney's fees were not available under the bad faith exception to the American rule when the finding of bad faith is an element of the cause of action. 976 F.2d at 550.

The other basis argued by the union for an award of fees was the district court's power "to remedy violations of the RLA 'by whatever appropriate means might be developed on a case-by-case basis.' *Chicago & North*

---

[5] *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958).

*Western Ry.*, 402 U.S. at 577, 91 S. Ct. at 1735." 976 F.2d at 551. However, as the Ninth Circuit stated:

> We find no evidence that Congress intended "such a radical departure from the long-established American rule" when it gave the district courts **broad remedial powers** under the RLA. (citation omitted) (emphasis added).

976 F.2d at 551. There, because the award of attorney's fees would "not [be] remedial [but] . . . punitive," the court refused to allow those fees. 976 F.2d at 551. Quite clearly, the Ninth Circuit's decision does not, by analogy or otherwise, support BMWE's position here. On the contrary, the Ninth Circuit's recognition that Congress gave the courts **broad remedial powers** under the RLA supports BN's position that a monetary remedy is available to a carrier when unions engage in unlawful strikes.

Further, *Horizon Air* shows the continuing controversy over whether or not all remedies are available for violations of the RLA. The Ninth, Sixth, and Fifth Circuits' recent decisions concerning this issue demonstrate the need for this Court's immediate attention to give guidance to the lower courts, the rail and airline industries, and the unions.

## THE COMMON LAW OF THE RLA DOES NOT SUPPORT *BURLINGTON NORTHERN'S* ABSOLUTE RULE

BMWE attempts to portray the common law of the RLA as having no published cases awarding damages to a union or to a carrier for violations of the RLA. Even though the dissent in *Marquar* collects the cases which establish a contrary common law (Slip op. at 28-30; 34a-36a), BMWE seeks support in the Fifth Circuit's decision in *United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) (*"Galveston Wharves"*). (Opposition Brief at 27 n.27). Not only does *Galveston Wharves* refute BMWE's view of the common

law, but it also establishes BN's asymmetry argument. BN's Petition at 23-25.

In *Galveston Wharves*, the union sought damages for the railroad's violation of section 156 (45 U.S.C. § 156) and the Fifth Circuit allowed such damages. The measure for computing damages was the lost pay of the members of the union employed by the railroad during the dispute. Realizing that *Galveston Wharves* does not fully support its position, BMWE argues that the union received an equitable remedy of back pay.[6] BN's claim here is for the court to award BN full equitable relief, including a monetary remedy. There is no logical basis to argue under the RLA that unions are entitled to legal damages or equitable monetary remedies, and the carriers are not. In essence, no basis can be found in the RLA or this Court's decisions for a flat rule of law that monetary relief is **never** available for illegal strikes over minor disputes.

---

[6] In another case ignored by BMWE, *United Transportation Union v. Florida East Coast Railway*, 586 F.2d 520, 524-25 (5th Cir. 1978), the court characterized the damages awarded in *Galveston Wharves* as "compensatory damages" and then discussed at length the applicable statute of limitations for "claims for money damages under the [RLA]."

## CONCLUSION

For the reasons BN sets forth above, this Court should grant BN's Petition for Writ of Certiorari to review the judgment and decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

THOMAS J. KNAPP
*Counsel of Record*
LAWRENCE M. STROIK
CHARLES W. SHEWMAKE
ODESA L. GORMAN-STAPLETON

BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102
(817) 878-2380

*Attorneys for Burlington Northern Railroad Company*